A

NASARUDDIN DAUD & ANOR

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
HASAN LAH JCA
AHMAD MAAROP JCA
[CRIMINAL APPEAL NOS: W-05-3-2005 & W-05-4-2005]

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17 MAY 2010

CRIMINAL PROCEDURE: *Appeal - Grounds of - Whether prosecution witnesses gave evidence under oath - Whether there was non-compliance by trial judge of s. 180 Criminal Procedure Code - Prima facie case,*

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whether made out by prosecution - Order by trial judge for accused to enter defence - Whether trial judge failed to judicially appreciate evidence of agent provocateur

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On 15 June 2001 acting on information received from an informer regarding drug trafficking activity involving the appellants, Nasaruddin and Azhar, around Jalan Raja Alang in the Chow Kit area, Inspector Haslah Bachok ('PW9') instructed Constable Abd Aziz Ahmad ('PW4') to act as an agent provocateur posing as a dangerous drug trafficker. The appellants were arrested by the police

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when they were delivering 1916.90 grams of cannabis to the agent provocateur, which the agent provocateur agreed to buy from the appellants pursuant to a negotiation between them. The appellants were charged with trafficking of the said cannabis in furtherance of their common intention, an offence punishable under s. 39B(2) of

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the Dangerous Drugs Act 1952 and read with s. 34 of the Penal Code. The High Court convicted them and sentenced them to death. They appealed to the Court of Appeal. Nasaruddin's ground of appeal was there was non-compliance by the trial judge of s. 180 of the Criminal Procedure Code. The thrust of his counsel's

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submission was that nowhere in record of the High Court proceeding was it shown that the trial judge had concluded that the prosecution had made out a *prima facie* case. It was also not recorded therein that the trial judge had ordered Nasaruddin to enter on his defence. Nasaruddin also filed a notice of motion in encl. 22a for leave to include and rely on an additional ground of appeal

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which was not pleaded in his Petition of Appeal *ie*, that the

convictions and the death sentences imposed on the appellants by the High Court are totally unsafe as all the witnesses for the prosecution have not given evidence on oath at the trial. As for Azhar, in pleading that the conviction against him be set aside, he attacked PW4's evidence and submitted that the learned trial judge erred where she failed to scrutinize the evidence of PW4.

Held (dismissing the appeals and affirming the convictions and sentences imposed by the High Court)
Per Ahmad Maarop JCA:

(1) In light of the uncontroverted evidence in the affidavits of the High Court interpreter and the Deputy Public Prosecutor who conducted the prosecution of the case against Nasaruddin and Azhar in the High Court, who were present throughout the trial in the High Court and upon considering the appeal record, this court was satisfied that all the prosecution witnesses and indeed all the witnesses in the trial (including Nasaruddin and Azhar) had given their evidence under oath. There is therefore no merit in encl. 22a and it is accordingly dismissed. (paras 2-6)

(2) From her judgment this court found that the learned trial judge had directed herself correctly on the law on the position of an agent provocateur. All the challenges made to PW4's evidence were foremost in the trial judge's mind when she considered whether PW4's evidence was credible. She did not err in disallowing PW4's investigation diary ('ID') to be produced in court. Since PW4 did not refer to the ID to refresh his memory while giving evidence, by virtue of s. 119(2) of the Criminal Procedure Code, Azhar and Nasaruddin were not entitled to call for or inspect the ID. Further, although as a matter of law PW4's evidence requires no corroboration, the learned trial judge found that PW4's evidence was corroborated by PW9's evidence in material particulars. (paras 14-16)

(3) The conclusion which must be drawn from the totality of PW4's and PW9's evidence is that Nasaruddin was acting in concert with Azhar. They were trafficking in the proscribed drug pursuant to their common intention. The trial judge was right when she held that the prosecution had proved a *prima facie* case of trafficking against Nasaruddin and Azhar as per the charge against them. (paras 18 & 19)

(4) It is apparent from the trial judge's grounds of judgment that the consideration whether the prosecution had made out a *prima facie* was clearly in her mind when the prosecution case was concluded. Before ordering Nasaruddin and Azhar to enter on their defence she directed herself the right question in considering the issue of *prima facie* case. The failure of the trial judge to record in the notes of the proceedings her finding that the prosecution had made out a *prima facie* case against Nasaruddin and Azhar, and her order calling upon them to enter on their defence, was not fatal to the prosecution. There is nothing under s. 180 of the Criminal Procedure Code or any other statute which makes it mandatory for the trial judge to record in the notes of the proceedings her finding that the prosecution had proved a *prima facie* case and her order calling upon them to enter on their defence. *Yap Chai Chai & Anor v. PP*, FC (refd); *Junaidi Abdullah v. PP* SC (refd); *PP v. Chan Wai Heng* (refd). (paras 22 & 23)

(5) The trial judge's conclusion was based on findings of facts which in turn depend on her finding on the credibility or otherwise of the prosecution witnesses particularly, PW4 and PW9 on the one hand, and of Nasaruddin and Azhar on the other, in respect of which findings this court is reluctant to interfere. There is no misdirection or appealable error on the part of the learned trial judge. Having carefully scrutinised the evidence on record and having carefully examined the judgment of the learned trial judge, this court is satisfied that the convictions and sentences on Nasaruddin and Azhar are safe. *Andy Bagindah v. PP* (refd); *Dato' Mokhtar Hashim & Anor v. PP* (refd). (paras 28 & 29)

Bahasa Malaysia *Translation Of Headnotes*

Pada 15 Jun 2001 bertindak atas maklumat yang diterima oleh seorang pemberi maklumat berhubung dengan pengedaran dadah melibatkan perayu-perayu, Nasaruddin dan Azhar, di sekitar Jalan Raja Along dalam kawasan Chow Kit, Inspektor Haslah Bachok ('PW9') mengarahkan Konstabel Abd Aziz Ahmad ('PW4') untuk berlakon sebagai ejen perangkap menyamar sebagai seorang pengedar dadah berbahaya. Perayu-perayu ditangkap oleh polis apabila mereka menghantar 1916.90 gram kanabis kepada ejen perangkap, yang mana ejen perangkap setuju untuk membeli dari perayu-perayu

menurut perundingan di antara mereka. Perayu-perayu dituduh dengan mengedar kanabis tersebut dengan pelanjutan niat bersama mereka, suatu kesalahan yang boleh dihukum di bawah s. 39B(2) Akta Dadah Berbahaya 1952 dan dibaca bersama dengan s. 34 Kanun Keseksaan. Mahkamah Tinggi menyabitkan mereka dan mengenakan hukuman mati atas mereka. Mereka merayu ke Mahkamah Rayuan. Alasan rayuan Nasaruddin adalah bahawa terdapat ketidakpatuhan oleh hakim perbicaraan dengan s. 180 Kanun Tatacara Jenayah. Teras hujahan peguamnya ialah tiada mana-mana dalam rekod prosiding Mahkamah Tinggi ia dibuktikan bahawa hakim perbicaraan telah membuat kesimpulan bahawa pendakwaan telah membuktikan suatu kes *prima facie*. Ia juga tidak direkodkan dalamnya bahawa hakim perbicaraan telah mengarahkan Nasaruddin untuk memasuki pembelaannya. Nasaruddin juga memfailkan suatu notis usul dalam Lampiran 22a untuk mendapatkan kebenaran untuk memasukkan dan bergantung atas sesuatu alasan rayuan tambahan yang tidak diplidkan di dalam Petisyen Rayuannya, iaitu, bahawa sabitan-sabitan dan hukuman-hukuman mati yang dikenakan atas perayu-perayu oleh Mahkamah Tinggi tidak sah kerana semua saksi-saksi pendakwaan tidak memberi keterangan setelah mengangkat sumpah di perbicaraan. Azhar pula, dalam merayu bahawa sabitan terhadapnya diketepikan, beliau menyoalkan keterangan PW4 dan menghujah bahawa yang arif hakim perbicaraan khilaf apabila beliau gagal meneliti keterangan PW4.

Diputuskan (menolak rayuan-rayuan dan mengesahkan sabitan-sabitan dan hukuman-hukuman yang dikenakan oleh Mahkamah Tinggi)
Oleh Ahmad Maarop HMR:

(1) Memandangkan keterangan yang tidak dapat disangkal di dalam afidavit-afidavit pentafsir Mahkamah Tinggi dan Penolong Pendakwa Raya yang menjalankan pendakwaan kes terhadap Nasaruddin dan Azhar di Mahkamah Tinggi, yang hadir sepanjang perbicaraan dalam Mahkamah Tinggi dan setelah menimbangkan rekod rayuan, mahkamah ini berpuashati bahawa kesemua saksi-saksi pendakwaan dan sebenarnya semua saksi-saksi dalam perbicaraan (termasuk Nasaruddin dan Azhar) telah memberi keterangan mereka setelah mengangkat sumpah. Oleh yang demikian tiada merit dalam Lampiran 22a dan ia ditolak sewajarnya.

(2) Daripada penghakimannya mahkamah ini berpendapat bahawa yang arif hakim perbicaraan telah mengarahkan dirinya dengan betul dalam undang-undang atas kedudukan seseorang ejen perangkap. Semua cabaran yang dibuat terhadap keterangan PW4 terutamanya dalam minda hakim perbicaraan apabila beliau menimbangkan sama ada keterangan PW4 boleh dipercayai. Beliau tidak khilaf apabila tidak membenarkan diari penyiasatan ('DP') dikemukakan di mahkamah. Oleh kerana PW4 tidak merujuk DP untuk mengingati semula semasa memberi keterangan, mengikut s. 119(2) Kanun Tatacara Jenayah, Azhar dan Nasaruddin tidak berhak memanggil untuk atau meneliti DP. Tambahan lagi, walaupun sebagai perkara undang-undang keterangan PW4 tidak memerlukan sokongan, yang arif hakim perbicaraan mendapati bahawa keterangan PW4 telah disokong oleh keterangan PW9 dalam butir-butir material.

(3) Kesimpulan yang mesti didapati dari keseluruhan keterangan PW4 dan PW9 adalah bahawa Nasaruddin bertindak bersama dengan Azhar. Mereka mengedar dalam dadah yang diharamkan menurut niat bersama mereka. Hakim perbicaraan betul apabila memutuskan bahawa pendakwaan telah membuktikan suatu kes *prima facie* mengedar terhadap Nasaruddin dan Azhar mengikut tuduhan terhadap mereka.

(4) Ia adalah ketara dari alasan-alasan penghakiman hakim perbicaraan bahawa pertimbangan sama ada pendakwaan telah membuktikan suatu kes *prima facie* adalah jelas dalam mindanya apabila kes pendakwaan ditutup. Sebelum mengarahkan Nasaruddin dan Azhar memasuki pembelaan mereka beliau mengarahkan dirinya soalan yang betul dalam menimbangkan isu kes *prima facie*. Kegagalan hakim perbicaraan untuk merekodkan dalam nota-nota prosiding dapatannya bahawa pendakwaan telah membuktikan suatu kes *prima facie* terhadap Nasaruddin dan Azhar, dan perintahnya memanggil mereka memasuki pembelaan mereka, tidak fatal kepada pendakwaan. Tidak ada apa-apa di bawah s. 180 Kanun Tatacara Jenayah atau mana-mana statut lain yang menjadikannya mandatori bagi hakim perbicaraan untuk merekodkan dalam nota-nota prosiding dapatannya bahawa pendakwaan telah membuktikan sesuatu kes *prima facie* dan perintahnya memanggil mereka memasuki pembelaan mereka. *Yap Chai Chai & Anor v. PP* FC (dirujuk); *Junaidi Abdullah v. PP* SC (dirujuk); *PP v. Chan Wai Heng* (dirujuk).

(5) Kesimpulan hakim perbicaraan berdasarkan dapatan-dapatan fakta yang bergantung pada dapatannya mengenai kredibiliti atau sebaliknya saksi-saksi pendakwaan terutamanya, PW4 dan PW9 dari satu segi, dan Nasaruddin dan Azhar sebaliknya, yang mana dapatan-dapatan mahkamah ini enggan mengusik. Tidak ada salah arahan atau kekhilafan yang boleh dirayu yang dibuat oleh yang arif hakim perbicaraan. Setelah meneliti dengan cermat keterangan pada rekod dan setelah mengkaji dengan cermat penghakiman yang arif hakim perbicaraan, mahkamah ini berpuashati bahawa sabitan-sabitan dan hukuman-hukuman yang dikenakan atas Nasaruddin dan Azhar adalah sah. *Andy Bagindah v. PP* (dirujuk); *Dato' Mokhtar Hashim & Anor v. PP* (dirujuk).

Case(s) referred to:
Andy Bagindah v. PP [2000] 3 CLJ 289 CA ***(refd)***
Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***
Gun Kim Luu v. PP [1961] 1 LNS 31 HC ***(refd)***
Junaidi Abdullah v. PP [1993] 4 CLJ 201 SC ***(refd)***
Namasiyiam Doraisamy v. PP & Other Cases [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 SC ***(refd)***
PP v. Chan Wai Heng [2008] 5 CLJ 805 CA ***(refd)***
PP v. Er Ah Keat [1966] 1 MLJ 9 ***(refd)***
PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***
Yap Chai Chai & Anor v. PP [1973] 1 LNS 177 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 119(2), 180
Dangerous Drugs Act 1952, ss. 2, 37(da), 39B(2), 40(1), (2)
Evidence Act 1950, s. 159(1), (2)
Penal Code, s. 34

For the 1st appellant - Sukhaimi Mashud; M/s Teh Poh Teik & Co
For the 2nd appellant - K Viknesvaran; M/s Viknes Ratna & Co
For the respondent - Awang Armadajaya Awang Mahmud (Zureen Elina Hj Mohd Dom with him) DPPs

[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-09-2002]

Reported by Susheila Sreedharan

A

JUDGMENT

Ahmad Maarop JCA:

Introduction

B **[1]** In this case, the appellants – Nasaruddin and Azhar were arrested by the police when they were delivering 1916.90 grams of cannabis to the agent provocateur (Constable Aziz) which the agent provocateur agreed to buy from the appellants pursuant to a negotiation between them. The appellants were charged with C trafficking of the said cannabis in furtherance of their common intention, an offence punishable under s. 39B(2) of the Dangerous Drugs Act 1952 (ADB) and read with s. 34 of the Penal Code. The High Court convicted them and sentenced them to death. They appealed to this court.

D

Application In encl. 22a

[2] Before considering the appeal proper we will consider the notice of motion in encl. 22a filed by Nasaruddin. In encl. 22a E Nasaruddin applied for leave to include and rely on the following additional ground of appeal which was not pleaded in his petition of appeal:

> That the convictions and the death sentences imposed on the appellants under section 39B(2) of the Dangerous Drugs Act 1952 F by the High Court are totally unsafe as all the witnesses for the prosecution have not given evidence on oath at the trial.

[3] The beginning of the notes of evidence of each witness for the prosecution in this case contains the usual particulars about the witness such as his or her age, address or occupation. This is G followed by the notes on what the witness said in examination in chief, cross-examination and re-examination, and if questions were asked by the courts, the notes on what the witness said in response to the questions. In other words the notes of evidence of each of the witnesses were recorded in the usual form. The only difference H is that in this case except at pp. 22, 57, 82 and 101 of the record of appeal, in the beginning of the evidence of each of the prosecution witnesses there is no note to say that he or she gave evidence under oath. The usual form of "En. … mengangkat sumpah dan bercakap dalam bahasa ..." followed by the language I used by the witness which is usually recorded at the beginning of

each witness' evidence, is missing at the beginning of the notes of evidence of each of these witnesses in the record of appeal in this case. However, at pp. 22 of the appeal record in respect of PW3 we find the following note – "under same oath". At p. 57 of the appeal record we find the following note – "Kons. Abdul Aziz – taking oath again". At p. 101 of the appeal record we find the following note – "Witness under same oath". We also find the following note at p. 126 of the appeal record – "Nasaruddin Daud: (under oath)". At p. 131 of the appeal record we find the following note – "OKT2: Azhar b. Nordin (under oath)". The question is whether the prosecution witnesses did or did not give evidence under oath.

[4] According to encl. 22a, the grounds in support of the application thereof are set out in the affidavit of Encik Hisyam bin Abdullah @ Teh Poh Teik, the counsel appointed to represent Nasaruddin in this appeal (encl. 22b). However, we find no such grounds in encl. 22b. What is stated in encl. 22b is the repetition of the additional ground of appeal in respect of which leave is sought by Nasaruddin. Encik Hisyam did not appear for either Nasaruddin or Azhar in the trial in the High Court. He was therefore not in the position to say what actually happened at the trial and to say whether the prosecution witnesses did or did not give evidence under oath. As against that, in opposing the application in encl. 22a, the Public Prosecutor filed two affidavits in reply. The first was affirmed by Sugandhi a/p K. Muniyandy. The second was affirmed by Wan Shaharuddin Wan Ladin. In her affidavit, Sugandhi, the interpreter attached to the Kuala Lumpur High Court from 2001 to 2005 said that what was alleged in encls. 22a and 22b was not true because in the trial in the High Court all the witnesses for the prosecution gave evidence under oath. Sugandhi also stated that in the trial from 12 August 2003 until 8 September 2003 all the prosecution witnesses gave evidence under oath and that each time the trial resumed after an adjournment, the prosecution witness who was to continue giving evidence took the oath again before testifying. This is clear from paras 5 and 6 of her affidavit:

> 5. Saya sesungguhnya menyatakan bahawa pada tarikh-tarikh perbicaraan bermula 12 Ogos 2003 sehingga 8 September 2003, saksi-saksi pendakwaan berikut:
>
> i) L/Kpl Mustapha
>
> ii) L/Kpl Kanapathy a/l Rajoo

A iii) Halimah bt Abdul Rahman

iv) Konstable Abd. Aziz b. Ahmad

v) C/Insp. Ahmad Tarmudi

B vi) C/Insp. Roslan bin Omar

vii) Insp. Mohd Nazri bin Mohd Ismail

viii) Kop. Det. Yusof b. Hj. Zainuddin

C ix) C/Insp. Haslah Bt. Bachok

telah masing-masing mengangkat sumpah dan memberi keterangan dalam Bahasa Malaysia.

6. Saya selanjutnya menyatakan bahawa pada setiap kali sambungan pemeriksaan (sambung bicara) dijalankan, saksi-
D saksi pendakwaan telah sekali lagi mengangkat sumpah dan memberi keterangan dalam Bahasa Malaysia.

[5] What was affirmed by Sugandhi as aforesaid was supported by Wan Shaharuddin. In his affidavit, Wan Shaharuddin said he was
E the Deputy Public Prosecutor who conducted the prosecution of the case against Nasaruddin and Azhar in the High Court. Wan Shaharuddin stated that all the prosecution witnesses had given evidence under oath in the trial. In parahs 6 to 13 of his affidavits, Wan Shaharuddin elaborated on the position of each of the
F prosecution witnesses according to the dates they gave evidence. He stated that on 12 August 2003 the first prosecution witness (L/Cpl Mustapha) and the second prosecution witness (L/Cpl Kanapathy a/l Rajo) gave evidence under oath and spoke in Bahasa Malaysia. On the same date, the third witness, Halimah bt. Abdul Rahman
G took the oath and gave evidence in Bahasa Malaysia. She took the oath again and spoke in Bahasa Malaysia on 13 August 2003 when the trial resumed after an adjournment. In this regard Wan Shaharuddin referred to p. 22 of the appeal record on which the following note was recorded – "under same oath". On 13 August
H 2003 the fourth witness Constable Abdul Aziz b. Ahmad took the oath and gave evidence in Bahasa Malaysia. On 14 August 2003, the fifth witness, (C/Insp. Ahmad Tarmudi), the sixth witness, (C/Insp. Roslan b. Omar) and the seventh witness (Insp. Mohd. Nazri b. Mohd Ismail) respectively took the oath and gave evidence
I in Bahasa Malaysia. On 15 August 2003, when the fourth witness,

(Constable Abd. Aziz) was recalled for the continuation of cross-examination, he took the oath again and gave evidence in Bahasa Malaysia. In this regard, Wan Shaharuddin referred to p. 57 of the appeal record where the following note was recorded: "Cpl. Aziz takes oath again". On 15 May 2003 the eighth witness (D/Lpl Yusof b. Hj. Zainuddin) took the oath and gave evidence in Bahasa Malaysia. In 28 August 2003, when the cross-examination on him continued, the fourth witness (Constable Abd. Aziz) took the oath and gave evidence in Bahasa Malaysia. On 8 September 2003 before being re-examined, Constable Abd. Aziz took the oath again and gave evidence in Bahasa Malaysia. On 8 September 2003 the ninth witness – C/Insp. Haslah bt. Bachok took the oath and gave evidence in Bahasa Malaysia. In this regard Wan Shaharuddin referred to p. 101 of the appeal record where the following note was recorded: "Witness under same oath".

[6] In the light of the uncontroverted evidence in the affidavits of Sugandhy and Wan Shaharuddin who were present throughout the trial of Nasaruddin and Azhar in the High Court and upon considering the appeal record, we are satisfied that all the prosecution witnesses and indeed all the witnesses in the trial (including Nasaruddin and Azhar) had given their evidence under oath. There is therefore no merit in the application in encl. 22a and we dismiss it.

[7] We were informed by learned counsel for Azhar that Azhar did not file a similar application as in encl. 22a. He informed us that he was not relying on the ground sought to be relied upon by Nasaruddin. We turn to the appeal proper.

Brief Facts

[8] On 15 June 2001 at about 5.30pm acting on information received from an informer regarding drug trafficking activity involving two Acheh nationals around Jalan Raja Alang in the Chow Kit area, Insp. Haslah bt. Bachok (PW9) instructed Constable Abd Aziz b. Ahmad (PW4) to act as an agent provocateur posing as a dangerous drug trafficker. At about 6pm PW4 met the informer. At that meeting PW4 learned from the informer that the proposed sale of the drug would take place at a Minang Restaurant in Chow Kit (the restaurant). PW4 relayed the information to SW9. PW9 told PW4 to meet her. At about 6.30pm on the same date, PW4 met PW9 in her office. PW9 gave him RM3,000 as "flash roll" – the

money to be shown to the suspected drug sellers to convince them of PW4's genuineness as a dangerous drug trafficker as well as his ability to pay for the drugs. Thereafter, PW4 proceeded to the restaurant on a motorcycle and arrived in front of the restaurant at about 7.45pm. At the restaurant PW4 met the informer. At about 8pm on the same date, the informer introduced PW4 to two Acheh nationals – namely Din and Bob. Din was wearing a white shirt and he was the taller of the two. Bob was shorter and he was wearing a black shirt. Din was identified in court as Azhar (the second appellant). Bob was identified in court as Nasaruddin (the first appellant). Din introduced Bob to PW4 as his friend. Din told PW4, "kau jangan takut ini orang aku juga". After introducing Din and Bob to PW4, the informer left the restaurant. Din then invited PW4 into the restaurant to talk. In the restaurant PW4 sat in front of Din. Bob sat beside Din. Din ordered food and PW4 ordered drink. Bob did not order anything.

[9] After food and drink were served, PW4 told Din that he was from Kuantan and he wanted to buy three kilograms of "Daun":

> Abang aku orang baru di sini. Aku datang dari Kuantan. Sekarang aku punya stock daun sudah kurang. Customer aku sedang tunggu aku di sana. Aku kena balik cepat. Aku mahu angkat 3 kilo daun. Dulu aku pernah deal 1 kali di sini. Tapi itu hari aku sudah kena tipu. Aku harap abang jujur. Abang boleh bagi itu stock daun atau tidak. Berapa harga abang boleh kasi sama aku.

In response, Din told PW4 not to worry as he (Din) was selling the "daun" cheap to PW4 at 1000 ringgit per kilo. Din assured PW4 that the "barang" was good. However, Din said he only had two kilograms and 200 packets. Din told PW4 to try first and that if they were okey PW4 could meet Din again for other deal. Din then asked PW4 whether he agreed. Din also asked PW4 to show his money:

> Engku jangan susah tentang itu daun, itu daun aku jual murah sama engkau 1 kilo 1 ribu ringgit. Ini barang, barang baik. Tapi aku tak ada stock yang kau minta. Aku cuma ada 2 kilo dan 200 packet sahaja. Kalau boleh cuba dulu. Kalau OK kau boleh jumpa aku untuk urusan lain. Setuju, mana duit engkau boleh kasi tunjuk.

PW4 opened his waist pouch and showed Din the money. When Din saw the money he nodded his head. Din then spoke to Bob in a language which PW4 did not understand, whereupon Bob got up and left the restaurant. PW4 and Din then finished their food and

drink, after which Din invited PW4 to proceed to a spot by the side of the road outside the restaurant to wait for the "barang" to arrive. After waiting by the road side for about 10-15 minutes, PW4 saw Bob approaching the place where he (PW4) and Din were waiting. PW4 saw Bob carrying a white plastic bag. Din told PW4 that the "barang" have arrived and told Bob to show the "barang" to PW4; "Itu barang sudah sampai. Hei Bob tunjuk itu barang dia". Upon PW4 being shown the contents of the plastic bag, Din asked PW4 for the money. Din said, "Kau boleh kira satu-satu kemudian. Aku tak tipu. Sekarang aku mahu wang aku".

[10] After looking into the plastic bag and upon being satisfied that the contents of the plastic bag were ganja, PW4 rubbed his head as a signal to PW9. On seeing that pre-arranged signal, PW9 and the police strike team who were waiting in ambush in and around the restaurant sprang into action. PW9 approached Din and Bob. At the distance of about 2-3 feet from them, PW9 identified herself as a police officer. Din and Bob were momentarily stunned and then tried to run away. PW9 and PW4 managed to overpower and arrest Bob after a struggle of about 2-3 minutes. When he was arrested Bob was still holding the white plastic bag in his hand. PW9 seized the plastic bag. Din who was arrested by other members of the police strike team was taken to PW9. In the presence of Din and Bob, PW9 examined the plastic bag and found in it two slabs suspected to be cannabis. In addition, PW9 also found in the plastic bag, 20 bundles each containing 10 packets. Each of 200 packets contained substance suspected to be cannabis.

[11] Later, the two slabs and the 200 packets containing substance suspected to be cannabis were examined and analysed by the Government Chemist, Halimah bt. Abdul Rahman (PW3) who confirmed them to contain 1916.9 grams of cannabis, a dangerous drug under the DDA.

Submissions

[12] Before us, with the dismissal of the application in encl. 22a, in his submission, learned counsel for Nasaruddin relied only on one ground – non-compliance by the learned trial judge of s. 180 of the Criminal Procedure Code. The thrust of his submission was that nowhere in record of the proceeding of the High Court (particularly pp. 125-126 of the appeal record) was it shown that the

learned trial judge had concluded that the prosecution had made out a *prima facie* case. It was also not recorded therein that the learned judge had ordered Nasaruddin to enter on his defence.

[13] As for Azhar, in pleading that the conviction against him be set aside, his learned counsel attacked PW4's evidence and submitted that the learned trial judge erred where she failed to scrutinize the evidence of PW4.

Decision

[14] We will first deal with the submission of learned counsel for Azhar. The issue raised by that submission is whether the learned trial judge had failed to judicially appreciate the evidence of PW4. PW4 was an agent provocateur. The law on the position of an agent provocateur and his evidence is settled. He is protected by the provision of s. 40(1) and (2) of the DDA in that he is not presumed to be unworthy of credit, and his evidence relating to any attempt to abet or abetment of the offence if done for the purpose of securing evidence against an accused person, is admissible. Similarly, any statement made to him by an accused person shall be admissible at the trial. There is no requirement for his evidence to be corroborated (See *Namasiyiam Doraisamy v. PP & Other Cases* [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 SC). From her judgment we find that the learned trial judge had directed herself correctly on the law which we have stated. Through his counsel, Azhar challenged the evidence of PW4 as being ridiculous (karut) and untrue, and that the whole of that evidence was PW4's own invention. This is evident from the cross-examination of PW4. Following through on the aforesaid challenge, it was put to PW4 that Azhar and Nasaruddin were framed. It was put to PW4 that Nasaruddin and Azhar were arrested in the restaurant without any reason. It was put to PW4 that the plastic bag was not in the possession of Nasaruddin and Azhar, and that Nasaruddin only had a sling bag when he was arrested. It was also put to PW4 that the plastic bag containing the proscribed drug was not carried by Bob (Nasaruddin) when he was arrested. It was put to PW4 that he was lying in court. In our view all these challenges were foremost in the mind of the learned trial judge when she considered whether PW4's evidence was credible. In the course of challenging PW4's evidence in the court below, learned counsel acting for Azhar also asked for PW4's investigation diary (ID) to be produced in court. This was

disallowed by the learned trial judge. Having regard to the evidence of PW4 we hold that she did not err in making the said ruling. According to PW4, he made notes on the arrest of Nasaruddin and Azhar in the ID when he returned to his office after the arrest but the notes were incomplete. The contents of the ID were not in evidence before the court. What was in evidence was PW4's testimony in court. Although he had referred to the ID for the purpose of refreshing his memory before the trial, PW4 had not referred to it while giving evidence in court pursuant to s. 159(1) and (2) of the Evidence Act 1950. Section 159 of the Evidence Act 1950 provides:

> (1) A witness may **while under examination** refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the court considers it likely that the transaction was at that time fresh in his memory.
>
> (2) The witness may also refer to any such writing made by any other person and read by the witness within the time aforesaid, if, when he read it, he knew it to be correct.

Section 119 of the CPC in turn provides:

> (1) Every police officer making a police investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary setting forth:
>
> (a) the time at which the order, if any, for investigation reached him;
>
> (b) the time at which he began and closed the investigation;
>
> (c) the place or places visited by him; and
>
> (d) a statement of the circumstances ascertained through his investigation.
>
> (2) Notwithstanding anything contained in the Evidence Act 1950 **an accused person shall not be entitled, either before or in the course of any inquiry or trial, to call for or inspect any such diary:**
>
> **Provided that if the police officer who has made the investigation refers to the diary for the purposes of section 159** or 160 of that Act, such entries only as the officer has referred to shall be shown to the accused, and the Court shall at the request of the officer cause any other entries to be concealed from view or obliterated.

[15] Since PW4 did not refer to the ID to refresh his memory while giving evidence, by virtue of s. 119(2) of the Criminal Procedure Code, the accused persons (Azhar and Nasaruddin) were not entitled to call for or inspect the ID. Indeed the contents of the ID which were entered by PW4 after the arrest of Nasaruddin and Azhar, were in fact statements made by PW4 in the course of police investigation and were therefore inadmissible in evidence except for the purpose provided under s. 159 of the Evidence Act 1950. (See *Gun Kim Luu v. PP* [1961] 1 LNS 31, *PP v. Er Ah Keat* [1966] 1 MLJ 9, as p 11 (H-I) per Raja Azlan Shah J (as His Royal Highness then was).

[16] In the end the learned trial judge found PW4's evidence to be unshaken. Having considered the evidence of PW4 in the appeal record ourselves, we cannot find fault with her finding. Further, although as a matter of law PW4's evidence requires no corroboration, the learned trial judge found that PW4's evidence was corroborated by PW9's evidence. PW9, who arrived at the restaurant at about 7.50pm, took-up position therein and sat at a table with two members of the police strike team. Other members of the strike team were spread out close by in the vicinity of the restaurant. From her position in the restaurant she saw Nasaruddin and Azhar entering the restaurant together with PW4 and sit at a table. From her position which was about 7-8 feet from where PW4, Nasaruddin and Azhar sat, PW9 could see them talking while having their drinks. At one stage of the meeting between PW4 and Nasaruddin and Azhar, PW9 saw PW4 opening his waist pouch and appeared to show something to Nasaruddin and Azhar. At about 8.10pm she saw Bob leaving the restaurant. About 10 minutes later, PW9 saw PW4 and Azhar walk out of the restaurant and stop at a spot by the side of Jalan Raja Alang which was in front of the restaurant. A few minutes later, she saw Bob coming back to the restaurant carrying a plastic bag in his hand and approach PW4 and Azhar. She saw Nasaruddin showing the plastic bag to PW4. PW9 then saw PW4 looking into the bag and rubbing his head which was the pre-arranged signal which SP9 was waiting for. PW9 and other members of the police strike team sprang into action and moved towards the spot where Nasaruddin, Azhar and PW4 were standing, and identified herself as a police officer. Nasaruddin and Azhar were momentarily stunned and then tried to escape. PW9 and PW4 managed to overpower Nasaruddin who was caught while still

holding the plastic bag containing the proscribed drugs. Azhar also failed to make good his escape as he was arrested by other members of the police strike team. We are therefore in agreement with the learned trial judge that PW4's evidence was corroborated by PW9's evidence in material particulars.

[17] To prove the offence of trafficking the prosecution could prove affirmatively that an accused was in possession of the proscribed drugs and then invoke the presumption of trafficking under s. 37(da) of the DDA, or it could establish its case of trafficking by proving any of the acts of trafficking as defined under s. 2 of the DDA. In *PP v. Mansor Md. Rashid & Anor* [1997] 1 CLJ 233, the Federal Court said:

> Having regard to the evidence of this case, it is our view that the learned trial judge was unduly concerned with the exclusivity of possession of room 'K' and the custody and control of the cannabis in question in relation to Amran. *It is essential to bear in mind that the case of the prosecution was not based on custody or control thereby invoking the presumption of possession, or on possession of 200g or more cannabis thereby attracting the presumption of trafficking under s. 37(d) or (da)(vi) of the Act. The prosecution founded its case of trafficking on the 'sale' of the cannabis to PW9, the agent provocateur.*
>
> Section 2 of the Act defines 'trafficking' thus:
>
> 'trafficking' *includes* the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug;
>
> *Hence the definition of 'trafficking' in the Act is wide and includes not only buying and selling but also carrying, keeping and concealing.* (emphasis added)

[18] After having undertaken a maximum evaluation of the evidence of PW4 and PW9, the learned trial judge concluded that the prosecution had established a *prima facie* of trafficking against Nasaruddin and Azhar as defined under s. 2 of the Act in furtherance of their common intention provided under s. 34 of the Penal Code. This what she said:

> There was evidence before the Court of OKT2 negotiating with SP4 and the transaction would have been completed had SP9 not appeared on the scene to intercept. OKT1 was present throughout and this was witnessed by SP9. It was OKT1 who was in direct physical possession of the P11 which contained the drugs. The conduct of OKT2 that he was in a position to "sell" the ganja and effectively had the power to dispose of the ganja and was about to accept the money from SP4.

She eventually concluded:

> The ingredients of the offence was established on the basis of direct evidence which fulfilled the requirements of trafficking s. 2 of the DDA 1952 in that OKT1 was carrying the drugs and together with OKT2 were in the course of giving the drugs to SP4. SP4 was in the course of handing over the money when he signalled to the police team that was in the immediate vicinity. OKT1 was very much in physical possession of the drugs. OKT2 was according to the evidence spear heading the transaction. He was the spokesman for the two and there was no suggestion whatsoever that he did not understand what the transaction was. The same could be said of OKT1 who stood up to fetch the bag of ganja
>
> …
>
> On the evidence as examined above and the law, it was found this was a case of entrapment in which there was direct evidence of OKT1 and OKT2 intending to sell ganja to SP4. Both OKT1 and OKT2 were found to be acting in concert. OKT1 could not be said to be in passive possession as he was "carrying" for the purpose of delivery. It was found that the prosecution had established the ingredients of trafficking within the ambit of section 2 of the DDA 1950 without having to rely any presumption.

[19] We agree. As we have said at the commencement of this judgment, on the evidence available, Nasaruddin and Azhar were arrested by the police when they, in furtherance of their common intention, were delivering the proscribed drugs to the agent provocateur (PW4) which PW4 had agreed to buy pursuant to a negotiation between them. Although the negotiation was done by Azhar, Nasaruddin was present in the negotiation. In fact he sat next to Azhar. Nasaruddin remained in the negotiation until PW4 showed the "flash roll" to Azhar. When Azhar saw the money he nodded his head and then spoke to Nasaruddin, whereupon Nasaruddin got up and left the restaurant. Although PW4 did not understand the language spoken by Azhar to Nasaruddin, the

inescapable inference is that the conversation must be about the "daun" (cannabis) Azhar and PW4 was negotiating to transact. Immediately after Azhar spoke to Nasaruddin, Nasaruddin left the restaurant and then came back a few minutes later carrying the plastic bag (containing the proscribed drugs) and showing it to PW4. In our judgment, the conclusion which must be drawn from the totality of PW4's and PW9's evidence is that Nasaruddin was acting in concert with Azhar. They were trafficking in the proscribed drugs pursuant to their common intention. The learned trial judge was right when she held that the prosecution had proved a *prima facie* case of trafficking against Nasaruddin and Azhar as per the charge against them.

[20] This brings us to the submission of learned counsel for Nasaruddin. The complaint here is that nowhere in the record of proceedings of the High Court (particularly pp. 125-126 of the appeal record) was it shown that the learned trial judge had considered and made the finding that the prosecution had made out a *prima facie* case. It was also not recorded in the notes of the proceedings that she had ordered Nasaruddin to enter on his defence. It was therefore contended that the learned judge failed to comply with s. 180 of the Criminal Procedure Code.

[21] Section 180 of the Criminal Procedure Code provides:

> (1) When the case for the prosecution is concluded, **the Court shall consider** whether the prosecution has made out a *prima facie* case against the accused.
>
> (2) If the Court finds that the prosecution has not made out a *prima facie* case against the accused, the Court shall record an order of acquittal.
>
> (3) If the Court finds that a *prima facie* case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.
>
> (4) For the purpose of this section, a *prima facie* case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[22] So, the crucial question is whether the learned trial judge considered whether the prosecution had made out a *prima facie* case against Nasaruddin and Azhar? In our view the answer to this question must be in the affirmative. This is clear from the grounds of judgment of the learned trial judge. The consideration whether the prosecution had made out a *prima facie* was clearly in her mind when the prosecution case was concluded (See pp. 153-192, 193 and 195 of the appeal record). Before ordering Nasaruddin and Azhar to enter on their defence (p. 192 of the appeal record), she directed herself the right question in considering the issue of *prima facie* case. In her grounds of judgment she said (at pp. 188-189):

> The decision in the case of *Looi Kow Chai & Anor v. PP* [2993] 1 CLJ 734 at p 753 had once again postulated the essence of a *"prima facie"* case.
>
> It therefore follows that there is only one exercise that a judge sitting alone under s. 180 of the Code has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and ask himself the question: If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no *prima facie* case has been made out and the accused would be entitled to an acquittal.

[23] We hold that the failure of the learned trial judge to record in the notes of the proceedings her finding that the prosecution had made out a *prima facie* case against Nasaruddin and Azhar, and her order calling upon them to enter on their defence was not fatal to the prosecution. There is nothing under s. 180 of the Criminal Procedure Code or any other statute which make it mandatory for the trial judge to record in the notes of the proceedings her finding that the prosecution had proved a *prima facie* case and her order calling upon them to enter on their defence. (See *Yap Chai Chai & Anor v. PP* [1973] 1 LNS 177; [1973] 1 MLJ 219, at 221, FC, *Junaidi Abdullah v. PP* [1993] 4 CLJ 201 SC and *PP v. Chan Wai Heng* [2008] 5 CLJ 805).

Defence

[24] Nasaruddin and Azhar gave evidence under oath. They called no other witness.

[25] The substance of Nasaruddin's defence was that on 15 June 2001, he was on the way back from work and was walking along Jalan Raja Alang carrying a bag containing his clothes. Suddenly, the police, who was chasing someone in front of him, caught him from the rear and seized his bag. Nasaruddin claimed that on that day he was not with Azhar and Azhar was not his friend. He denied being in possession or having any knowledge of the plastic bag and the drugs in it.

[26] In his evidence Azhar claimed that he was arrested as he was leaving the Surau in the area of the Muetenah Rumah Makan Acheh 2, looking for food. He heard the shout "polis" and he ran because he had no valid document when he entered Malaysia but was arrested by the police. He claimed that he did not know Nasaruddin at all. He denied talking to the latter at the restaurant. According to him he did not talk to anybody in the restaurant. He denied ownership and knowledge of the proscribed drugs.

[27] The learned trial judge found that the evidence of Nasaruddin and Azhar was directly opposed to the version of the prosecution established by PW4 and PW9's evidence. She found that the gist of Nasaruddin's and Azhar's defence is as follows:

(1) Both OKT1 and OKT2 did not know one another until after they were both apprehended. A version was also given that they were only acquainted after having been charged in a lower court for illegal entry;

(2) Both did not know what they were arrested for;

(3) Both had no knowledge of the existence of the cannabis nor were they engaged in any transaction;

(4) The arrest was a mistake; and

(5) OKT2 said he ran because being an illegal he was afraid of the police.

[28] The learned trial judge considered the defence of Nasaruddin and Azhar and evaluated it in the light of the evidence adduced by the prosecution which she found to have established a *prima facie* case. She found the defence of both of them to be generally one of denial. This is what she said:

There was no burden emplaced on the defence to produce witnesses. But in response to various questions posed by the prosecution OKT2 also gave simple denials as to his connection with the ganja that was being carried by OKT1. Overall, the suggestion of defence was that:

(i) With respect to OKT1, being an illegal who by his own evidence was supposed to be employed somewhere in Bangsar, he was "framed" in an operation where the police use illegals to blame for trafficking.

(ii) With respect OKT2, since he was an illegal and taking shelter in a surau for three days it was untenable that he would be engaged in trafficking. The gist again was that illegals are swooped upon and "picked" for purposes of being charged for trafficking. The crux of contention was also that the police and the enforcement agencies are arbitrary and untrustworthy. The entrapment was for a frame-up or also for taking money from the illegal immigrants. Also suggested was that informers are not to be trusted because their objective is to obtain payment.

The inherent incredibility of the defence failed to rebut the prosecution's case. At the end of the defence it was found that the prosecution had established a case beyond reasonable doubt and OKT1 and OKT2 were found guilty of the charge preferred against them.

[29] That conclusion of the learned trial judge was based on findings of facts which in turn depend on her finding on the credibility or otherwise of the prosecution witnesses particularly, PW4 and PW9 on the one hand, and of Nasaruddin and Azhar on the other, in respect of which findings this court is reluctant to interfere (See *Andy Bagindah v. PP* [2000] 3 CLJ 289, *Dato' Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101; [1983] 2 MLJ 232 at p. 273). We find no misdirection or appealable error on the part of the learned trial judge. Having carefully scrutinised the evidence on record and having carefully examined the judgment of the learned trial judge, we are satisfied that the convictions and sentences on Nasaruddin and Azhar are safe. In the result their appeals are dismissed and the convictions and sentences imposed on them by the High Court are affirmed.